UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

FRACTUS, S.A.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 6:09-cv-00203
	§	
SAMSUNG ELECTRONICS CO., LTD.; *et al.*	§	
	§	
Defendants.	§	JURY TRIAL DEMANDED

FRACTUS'S REPLY TO DEFENDANTS' OPPOSITION TO FRACTUS'S MOTION FOR PROTECTIVE ORDER UNDER RULE 26(c) REGARDING ITS P.R. 3-1 INFRINGEMENT CONTENTIONS

Fractus's Motion for Protective Order (Dkt. 392) merely seeks minimal protection of Fractus's confidential technical data and analysis while allowing Defendants every opportunity to disclose Fractus's Infringement Contentions ("Fractus's Contentions") as is reasonably needed. In Defendants' Opposition to Fractus's Motion (Dkt. 393), Defendants did not describe a single scenario in which expansive disclosure of Fractus's Contentions would further any legitimate end. Defendants seek to disclose Fractus's Contentions to the PTO during reexamination of Fractus's patents and to "suppliers or others having an interest in the outcome of this litigation." *See* Dkt. 393 at 3. However, Fractus's Contentions are wholly irrelevant to any reexamination, and Defendants have not explained how disclosure to suppliers and others relates to its allegedly "important strategic considerations."[1] Most importantly, Defendants now admit exactly why these contentions should stay confidential: They wish to publicly release the results of Fractus's engineering analysis that it undertook at substantial expense. This analysis is

[1] If there were some reason disclosure would be appropriate (*e.g.*, if a supplier had agreed to indemnify Defendants), Fractus would allow reasonable disclosure, as it has always done.

not in the public domain and is not easily ascertainable from the accused devices themselves. Rather, Fractus had to reverse engineer this data. Defendants now want to take this data and disclose it in the public domain so that Fractus's competitors can benefit from Fractus's own work. Preventing such disclosure is exactly the purpose of the Protective Order, and it is the reason why these documents should stay confidential. Defendants' arguments for disclosure are further strained by the fact that, while calling for the de-designation of Fractus's Contentions, Defendants maintain the confidential designation of their Invalidity Contentions.

ARGUMENT

I. Fractus's Infringement Contentions are properly designated "CONFIDENTIAL."

The Protective Order clearly contemplates that information like that found in Fractus's Contentions is properly designated "CONFIDENTIAL."[2] The Protective Order provides for limited disclosure of "technical, business, or financial information" and "non-public technical information, including schematic diagrams, manufacturing and engineering drawings, . . . and other non-public technical descriptions and/or depictions of the relevant technology." *Id.* at ¶¶ 2, 3(i). Fractus's Contentions contain non-public technical information generated by Fractus at considerable expense.[3] This is precisely the type of information the Protective Order indicates can be properly designated as "CONFIDENTIAL."

Defendants are unable to explain why the plain language of the Protective Order should not apply to Fractus's Contentions. Defendants have suggested Fractus's technical analysis is

[2] Fractus has always maintained that its Infringement Contentions are confidential. Similarly, Fractus has consistently argued that Defendants' Invalidity Contentions are not confidential. To the extent Defendants have suggested Fractus has done an "about face" on these issues, they have mischaracterized Fractus's position. *See* Dkt. 393 at 5 n.3.

[3] Defendants argument that Fractus's Motion for Protective Order should be denied for failing to specify what proprietary information the Infringement Contentions contain is clearly unsupportable. As Defendants note, Fractus expressly described its analysis of "impedance levels, radiation patterns, and current-shaping behavior." *See* Dkt. 393 at 4 (citing Dkt. 392 at 4). Furthermore, despite the purported lack of clarity, Defendants have assembled examples of the exact figures Fractus seeks to protect. *See* Dkt. 393, Ex. 1.

not confidential because it pertains to Defendants' products. However, the Protective Order does not limit protection in this way. *See* Dkt. 266 at ¶ 3 (indicating that a party can protect information regarding "the relevant technology" rather than a party's own technology). There is no support in the Protective Order or elsewhere for Defendants' argument that, simply because Fractus's confidential information pertains to Defendants' products, "Defendants should have the ability to use that information as they so choose."[4] *See* Dkt. 393 at 3. Furthermore, that those in the antenna industry can replicate Fractus's technical data by "performing their own tests" does nothing to diminish the value of Fractus's data or justify giving it to those who shared none of the costs. *See* Dkt. 393 at 5. While the information may be obtainable, that certainly does not mean it is easily or readily obtainable. Indeed, this is exactly the point: Others have to do their own testing to recreate what Fractus has done. It is not readily ascertainable from simply looking at the accused devices, but rather requires a detailed study and analysis by testing, measuring, and analyzing the phones. This is exactly what the Protective Order is designed to protect.

Defendants do not dispute that the testing of the phones here is <u>not</u> in the public domain. Finally, Defendants argue that ¶ 4(e) of the Protective Order indicates Fractus's technical data is not confidential. Dkt. 393 at 3. However, Defendants' overly-broad reading of ¶ 4, which deals largely with "publicly available" materials, conflicts with both ¶¶ 2 and 3, which unambiguously call for the protection of non-public technical data. *See* Dkt. 266. Moreover, this is not the simple "legal examination" described in ¶ 4(e). Generating the information contained in Fractus's Infringement Contentions required Fractus to engage in costly and elaborate testing of

[4] Defendants also seem to argue that somehow there aren't enough technical figures included in the Infringement Contentions or that the information should be treated differently because it is in "graphical form, rather than the underlying data." *See* Dkt. 393 at 2, 4. However, the Protective Order does not suggest that the form of Fractus's technical information is of any consequence.

the accused infringing devices and conduct extensive technical analysis of the data generated. This information fits much more readily into the category of protectable "non-public technical information" described in ¶ 3(i) than the non-confidential information described in ¶ 4.

II. Defendants have not identified a single proper reason for seeking wide disclosure.

Defendants have expressed a desire to disclose Fractus's Contentions to the PTO during reexamination of Fractus's patents. However, Fractus's Contentions are not relevant at all in the context of a reexamination. It is the claim construction order from the District Court that should govern claim scope—not a plaintiff's preliminary infringement contentions. Furthermore, Defendants' purported concerns that Fractus might seek a broad interpretation of its claims in litigation but pursue a narrow interpretation at the PTO are wholly unfounded. If any party could be expected to take inconsistent positions regarding claim scope, it would be the Defendants taking inconsistent positions by contending the PTO must construe the claims more broadly than this Court does. If Defendants have a real concern about inconsistent claim constructions between this Court and the PTO, then Fractus invites the Defendants to join with it now and agree that all parties to this litigation will start with this Court's claim construction as the appropriate construction that the PTO should adopt in the event a reexamination occurs.

Regarding Defendants' desire to disclose Fractus's Contentions to "suppliers and others," Defendants offer no explanation regarding how they would benefit from such disclosure. As set forth above, however, the benefits seem clear: Disclosure to suppliers would allow Defendants' suppliers and others to make use of Fractus's proprietary data without bearing any of the costs and would risk exposing Fractus to declaratory judgment actions. Defendants' desire to disclose this information to suppliers highlights some of Fractus's most pressing concerns. Fractus has gone to great expense to measure the properties and behaviors of Defendants' antennas, creating

a substantial volume of valuable data included in Fractus's Infringement Contentions. Such disclosure would allow Defendants' suppliers to use Fractus's proprietary data to improve their antenna designs based on Fractus's information. This would harm Fractus by allowing Fractus's own proprietary research to jump start efforts to improve the products offered by antenna designers. Such harm is wholly unnecessary and properly avoided under the terms of the Protective Order by limiting disclosure to its proper scope.

DATED this 24th day of May, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of **FRACTUS'S REPLY TO DEFENDANTS' OPPOSITION TO FRACTUS'S MOTION FOR PROTECTIVE ORDER UNDER RULE 26(c) REGARDING ITS P.R. 3-1 INFRINGEMENT CONTENTIONS** was served on May 24, 2010 by electronic mail to the following counsel of record:

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